A

PP

v.

AN KEE CHENG & ANOTHER CASE

B

HIGH COURT MALAYA, SHAH ALAM
ZAHARAH IBRAHIM JC
[CASES NO: 45-143-2005 & 45-164-2005]
22 DECEMBER 2005

C ***CRIMINAL PROCEDURE:*** *Jurisdiction of court - Magistrate's court - Transmission of cases to High Court - Whether consent of public prosecutor must be obtained - Dangerous Drugs Act 1952, ss. 39B & 41A - Federal Constitution, art. 145 - Criminal Procedure Code, ss. 177A, 376(1)*

D The accused in case no.45-143-2005 was first produced before the Magistrate's court on 13 June 2005. After several postponements and failing to obtain the public prosecutor's consent and requisition, the case was transmitted to the High Court by the Magistrate's court on 14 November 2005. The E accused in case no. 45-164-2005 was produced before the Magistrate's court on 12 October 2004. After being mentioned several times, the Magistrate's court fixed 25 November 2005 as the date for final mention. However, on the said date, the Magistrate's court was informed that the investigation papers were F still with the Deputy Public Prosecutor. The presiding Magistrate promptly transmitted the case to the High Court. After perusing the record of proceedings for both cases, this court found that they had been transmitted without the consent of the Public Prosecutor, whether formal or informal, express or implied. In the G circumstances, this court deemed it proper that the power of revision on Chapter XXXI of the Criminal Procedure Code ('CPC') be exercised in respect of both cases.

H **Held (setting aside orders of the Magistrate's court transmitting cases no 45-143-2005 and 45-164-2005 to the High Court):**

(1) As an offence under s. 39B of the Dangerous Drugs Act 1952 ('DDA') carries a death sentence, that offence can only be tried by the High Court. Nevertheless, the transmission of I such cases to the High Court could not be effected by the Magistrate under s. 41A of the DDA without the consent of the Public Prosecutor, according to subsection 39B(3) and (4) of the DDA. (para 10)

(2) The consent of the public prosecutor was *in lieu* of the committal order which previously could only be made by a Magistrate at the end of a preliminary inquiry, after evidence by deposition had been taken by the Magistrate and he was satisfied that there was sufficient evidence for the case to be tried in the High Court. This filtering process through preliminary inquiries has been replaced with the process of filtering through the mechanism of the public prosecutor's consent. Such filtering process was **not** capable of being performed by a Magistrate after the abolition of preliminary inquires. At the stage of the case before the Magistrate as in the two said cases herein, only the public prosecutor has the capacity, with all the information available to him or which he was capable of obtaining from the police or other enforcement agencies, to determine whether there was sufficient evidence for the case to be tried by the High Court in accordance with Chapter XX of the CPC. (para 17)

(3) Under cl. (3) of art. 145 of the Federal Constitution, the Attorney General has the discretionary power to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Syariah court, a native court or a court martial. Further, according to cl. (3A) of that Article, federal law may confer on the Attorney General power to determine the courts in which any proceedings which he has power to institute shall be instituted or to which the proceedings shall be transferred. According to subsection 376(1) of the CPC, the Attorney General is the public prosecutor. As such, the requirement for consent in s.177A of the CPC, as is the requirement for consent in s. 39B of the DDA, is consistent with the provisions of cls. (3) and (3A) of art. 145 of the Federal Constitution. (paras 18 & 20)

(4) Whether or not subsections 39B(3) and (4) and s. 41A of the DDA still apply or have been repealed and replaced by s. 177A of the CPC, the fact remained that the consent of the public prosecutor must be obtained **before** a Magistrate's court transmits to the High Court any case under s. 39B of the DDA or any other case that is to be tried by the High Court in accordance with Chapter XX of the CPC. (para 24)

(5) No power is conferred on any court – whether a subordinate court or a superior court – to transmit to the High Court any case under s. 39B of the DDA or any other case that is to

be tried in accordance with Chapter XX of the CPC by the High Court if the consent of the public prosecutor has not been obtained. (para 25)

[Both cases ordered to be returned to the relevant Magistrate's Courts pending the consent of the Public Prosecutor for their transmission to the High Court.]

Case(s) referred to:
Karpal Singh & Anor v. PP [1991] 2 CLJ 1458; [1991] 1 CLJ (Rep) 183 SC ***(refd)***
PP v. Oladotun Lukmaru Umaru & Ors [1991] 1 MLJ 187 ***(refd)***

Legislation referred to:
Criminal Procedure Code (Amendment) Act 1994, ss. 177A, 376(1)
Dangerous Drugs Act 1952, ss. 39B(3), (4), 41A(2)
Federal Constitution, art. 145

Reported by Suhainah Wahiduddin

JUDGMENT

Zaharah Ibrahim JC:

Background

[1] The accused in case no. 45-143-2005 was first produced before the Magistrate's Court in Petaling Jaya on 13 June 2005. After several postponements as the chemist report was not ready and the Public Prosecutor's consent and requisition had not been obtained, the case was mentioned again before the relevant Magistrate's Court on 10 October 2005. On that date, the Magistrate's Court was informed that the Investigation Papers were with the Deputy Public Prosecutor. The Magistrate then gave a final mention date, being 14 November 2005, with a warning that the case would be transmitted to the High Court notwithstanding the absence of a formal requisition. On 14 November 2005 the case was transmitted to the High Court by that Magistrate's Court.

[2] The accused in case no. 45-164-2005 was produced for the first time before the Magistrate's Court in Petaling Jaya on 12 October 2004 and after being mentioned several times as the Public Prosecutor's directive was still pending, the relevant Magistrate's Court, on 19 October 2005, fixed 25 November 2005

as the date for final mention, also with the warning that in the event that the Public Prosecutor's consent was still not available, the case would then be transmitted to the High Court. On 25 November 2005, the Magistrate's Court was informed that the Investigation Papers were still with the Deputy Public Prosecutor. The presiding Magistrate promptly transmitted the case to the High Court.

[3] After perusing the record of proceedings for both cases, this court found that both cases had been transmitted without the consent of the Public Prosecutor, whether formal or informal, express or implied.

[4] This court had also received a letter from Messrs. Ng Aik Guan & Co., the legal firm representing the accused in case no. 45-143-2005, requesting that this case be returned to the Magistrate's Court.

[5] In the circumstances, this court deemed it proper that the power of revision in Chapter XXXI of the Criminal Procedure Code (after this referred to as the "CPC") be exercised in respect of both cases.

Consent Of The Public Prosecutor Under The Law

Position Under The DDA

[6] Before the CPC was amended *via* the Criminal Procedure Code (Amendment) Act 1994 (after this referred to as "Act A908") every case to be tried in the High Court under Chapter XX of the CPC had to go through the process of preliminary inquiry and would only be produced for trial before the High Court upon the completion of the preliminary inquiry and the relevant Magistrate making an order committing the accused to the High Court. The Magistrate could only commit an accused to be tried in the High Court if he found, from the preliminary inquiry, that there was sufficient case for such committal.

[7] However, an exception to the process of preliminary inquiry was made for cases under the Dangerous Drugs Act 1952 (after this referred to as the "DDA") that can be tried by the High Court only or which are required by the Public Prosecutor to be tried by the High Court.

[8] This provision is contained in s. 41A of the DDA which reads as follows:

41A (1) Where any case in respect of an offence under this Act is triable exclusively by the High Court or is required by the Public Prosecutor to be tried by the High Court, the accused person shall be produced before the appropriate subordinate court which shall, after the charge has been explained to him, transmit the case to the High Court without holding a preliminary inquiry under Chapter XVII of the Criminal Procedure Code, and cause the accused person to appear or be brought before such Court as soon as may be practicable.

(2) When the accused person appears or is brought before the High Court in accordance with subsection (1), the High Court shall fix a date for his trial which shall be held in accordance with the procedure under Chapter XX of the Criminal Procedure Code.

(3) The trial of a case transmitted to the High Court under subsection (1) shall be by a Judge of the High Court sitting alone and the provisions of Chapter XXI and XXII of the Criminal Procedure Code shall not apply to such trial.

(4) The provisions of subsections (1), (2) and (3) shall have effect notwithstanding any other written law to the contrary.

[9] Apart from the exception in respect of preliminary inquiries, the DDA also contains provisions in s. 39B, namely in subsections 39B(3) and (4), which read as follows:

(3) A prosecution under this section shall not be instituted except by or with the consent of the Public Prosecutor.

Provided that a person may be arrested, or a warrant of arrest may be issued and executed, and any such person may be remanded in custody notwithstanding that the consent of the Public Prosecutor to the institution of a prosecution for the offence has not been obtained, but the case shall not be further prosecuted until the consent has been obtained.

(4) When a person is brought before a Court under this section before the Public Prosecutor has consented to the prosecution the charge shall be explained to him but he shall not be called upon to plead, and the provisions of the law for the time being in force relating to the criminal procedure shall be modified accordingly.

[10] As an offence under s. 39B of the DDA carries a death sentence, it goes without saying that that offence can only be tried by the High Court. Nevertheless, the transmission of such cases to the High Court cannot be effected by the Magistrate under s. 41A of the DDA without the consent of the Public Prosecutor since, according to sub-ss. 39B(3) and (4) of the DDA, before the consent of the Public Prosecutor is obtained, only the following acts can be done:

(1) arresting the accused or issuing a warrant for his arrest

(2) remanding the accused

(3) reading the charge to the accused without calling upon him to plead.

[11] The power of the Magistrate to transmit cases under s. 39B of the DDA to the High Court under s. 41A of the DDA was clarified by His Lordship Edgar Joseph Jr. J (as he then was) in the case of *Public Prosecutor v. Oladotun Lukmaru Umaru & Ors* [1991] 1 MLJ 187. A copy of the report of this case was sent to this court together with the letter from the accused's counsel as mentioned above.

Position Under The Criminal Procedure Code

[12] Upon the coming into force of Act A908 on 17 February 1995, preliminary inquiries ceased to exist. So did trials by jury or assessors in the High Courts. Consequently, from 17 February 1995 all cases to be tried in the High Court no longer need to go through the process of preliminary inquiry and all criminal cases tried by the High Court are tried before a judge sitting alone.

[13] Act A908 (*via* s. 8) also inserted the provisions of s. 177A into the CPC. According to the Explanatory Statement to the Bill by which Act A908 was enacted:

> 4. Clause 8 provides for the transmission of cases to the High Court, without holding a preliminary inquiry under Chapter XVII of the Code, to be tried by such Court.

[14] The cl. 8 mentioned in the Explanatory Statement to the Bill is s. 8 of Act A908 which inserted s. 177A.

[15] Section 177A of the CPC reads as follows:

177A. (1) A prosecution in respect of an offence which is to be tried by the High Court in accordance with Chapter XX, shall not be instituted except by or with the consent of the Public Prosecutor:

Provided that a person may be arrested, or a warrant for his arrest may be issued and executed, and any such person may be remanded in custody notwithstanding that the consent of the Public Prosecutor to the institution of a prosecution for the offence has not been obtained, but the case shall not be further prosecuted until the consent has been obtained.

(2) In any prosecution pursuant to subsection (1), the accused shall be produced before the Magistrate's Court which shall, after the charge has been explained to him, transmit the case to the High Court and cause the accused to appear or be brought before such Court as soon as may be practicable:

Provided that when the accused is brought before the Magistrate's Court before the Public Prosecutor has consented to the prosecution, the charge shall be explained to him but he shall not be called upon to plead thereto.

(3) When the accused appears or is brought before the High Court in accordance with subsection (2), the High Court shall fix a date for his trial which shall be held in accordance with the procedure under Chapter XX.

[16] As mentioned above, the Explanatory Statement to the Bill by which Act A908 was enacted does not state why the consent of the Public Prosecutor is required for the transmission of cases to the High Court. The speech introducing the Bill in Parliament did not give any explanation for the insertion of the consent requirement either.

[17] However, I am of the opinion that such consent is *in lieu* of the committal order which previously could only be made by a Magistrate at the end of a preliminary inquiry, after evidence by deposition had been taken by the Magistrate and he was satisfied that there was sufficient evidence for the case to be tried in the High Court. This filtering process through preliminary inquiries has clearly now been replaced with the process of filtering through the mechanism of the Public Prosecutor's consent. Such filtering process is not capable of being performed by a Magistrate after the abolition of preliminary inquiries. At the stage of the case before the Magistrate as in the case of case no. 45-143-2005 and case no. 45-164-2005, only the Public Prosecutor has the

capacity, with all the information available to him or which he is capable of obtaining from the police or other enforcement agencies, to determine whether there is sufficient evidence for the case to be tried by the High Court in accordance with Chapter XX of the CPC.

[18] Under cl. (3) of art. 145 of the Federal Constitution, the Attorney General has the discretionary power to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Syariah court, a native court or a court-martial. Further, according to cl. (3A) of that article, federal law may confer on the Attorney General power to determine the courts in which any proceedings which he has power to institute shall be instituted or to which the proceedings shall be transferred. According to sub-s. 376(1) of the CPC, the Attorney General is the Public Prosecutor.

[19] From the decision of the Supreme Court in the case of *Karpal Singh & Anor v. Public Prosecutor* [1991] 2 CLJ 1458; [1991] 1 CLJ (Rep) 183, it is clear how wide the discretionary power of the Public Prosecutor is under cl. (3) of art. 145 of the Federal Constitution. In that case, the Supreme Court said:

> For our immediate purpose we wish to refer to art 145(3) of the Constitution which states that the Attorney General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before Syariah Court etc. ... The discretion vested in the Attorney General is unfettered and cannot be challenged and substituted by that of the court's. The reasoning and logic behind such contention is well illustrated in the cases of *PP v. Lee Tin Bau* [1985] 1 MLJ 388, *Long bin Samat & Ors v. PP* [1974] 2 MLJ 152, *PP v. Datuk Harun bin Haji Idris and Ors* [1976] 2 MLJ 116 and *Poh Cho Ching v. PP* [1982] 1 MLJ 86. In the circumstances, it is superfluous to reiterate the same points.

[20] As such, the requirement for consent in s. 177A of the CPC, as is the requirement for consent in s. 39B of the DDA, is consistent with the provisions of cls. (3) and (3A) of art. 145 of the Federal Constitution.

Have sub-ss. 39b(3) And (4) And s. 41A Of The DDA Been Repealed?

[21] A comparison of the provisions of s. 177A of the CPC with sub-ss. 39B(3) and (4) and s. 41A of the DDA shows that s. 177A contains provisions similar to sub-ss. 39B(3) and (4) of the DDA and it also contains the requirement on the transmission

of cases as in sub-s. 41A(1) of the DDA as well as provisions on the fixing of the date for trial as are found in sub-s. 41A(2) of the DDA. The trials referred to in sub-ss. 177A(1) and (3) of the CPC are trials which must be conducted in accordance with Chapter XX of the CPC. The same thing as is mentioned in sub-s. 41A(2) of the DDA.

[22] I am therefore of the opinion that when Act A908 repealed the provisions in the CPC on trials by jury or assessors and on preliminary inquiries and inserted s. 177A, it can be argued that the implied repeal of the provisions of sub-ss. 39B(3) and (4) and s. 41A of the DDA had occurred.

[23] If so, then ALL transmissions of cases to the High Court to be tried in accordance with Chapter XX of the CPC must comply with the provisions of s. 177A of the CPC and without fail the consent of the Public Prosecutor must be obtained before a case is transmitted to the High Court.

Conclusion

[24] It can be concluded that whether or not sub-ss. 39B(3) and (4) and s. 41A of the DDA still apply or have been repealed and replaced by s. 177A of the CPC, the fact remains that the consent of the Public Prosecutor must be obtained before a Magistrate's Court transmits to the High Court any case under s. 39B of the DDA or any other case that is to be tried by the High Court in accordance with Chapter XX of the CPC.

[25] No power is conferred on anv court – whether a subordinate court or a superior court – to transmit to the High Court any case under s. 39B of the DDA or any other case that is to be tried in accordance with Chapter XX of the CPC by the High Court if the consent of the Public Prosecutor has not been obtained.

Decision And Order

[26] Based on what has been stated above, I find that the orders of the Magistrate's Court transmitting cases no. 45-143-2005 and 45-164-2005 to the High Court were incorrect in law and invalid. That being the case those orders are set aside.

[27] Both cases are ordered to be returned to the relevant Magistrate's Courts pending the consent of the Public Prosecutor for their transmission to the High Court.